Supreme Court, U.S.
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No. 91-740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION FILED BY RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE

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ARGUMENT

1. Respondents and *amicus curiae* do not address the principal reason the Court should grant a writ of certiorari in this case: To preserve the balance of powers between coordinate branches and ensure judicial independence, the courts must enforce the explicit constitutional mandate that the Senate try all impeachments.

Through the impeachment power, Congress possesses the ultimate power over judges and executive officials, but the Framers deliberately constructed a cumbersome impeachment procedure to control that ultimate power. That procedure requires impeachment by the House of Representatives, trial by the Senate, and conviction by a two-thirds vote in the Senate.

Contrary to the assertion by respondents and *amicus curiae*, *see* Opp. at 9, the clear command that the Senate try impeachments is no mere procedural "detail," unimportant to the Framers, and left to the complete discretion of the Senate. Instead, the Senate trial is fundamental to the impeachment process, and thereby safeguards the independence of the judiciary and the vitality of the Constitution itself. As the Chief Justice recently remarked, "a constitution's impressive catalogue of individual rights or limitations on government power is not enough if the judges who are called upon to enforce these rights have no independence from the other branches of government." Rehnquist, C.J., *The Bill of Rights and an Independent Judiciary*, at 26 (December 2, 1991).

2. Because respondents and *amicus curiae* relegate the Senate trial to the status of a procedural "detail," instead of recognizing it as an explicit constitutional requirement, they are incorrect in their argument that *Powell v. McCormack*, 395 U.S. 486 (1969), does not control here. *See* Opp. at 8, 12-13. In *Powell*, as in this case, an action by a House of Congress was defended on the ground that such action was taken pursuant to a constitutional grant of exclusive power to that House. Yet in that case, as here, judicial review was required because the action had exceeded an explicit limitation on that grant of power, and was contrary to an express constitutional command. In *Powell* the constitutional limitation was contained in the "qualifications" clause of the Constitution, art. I, § 2, cl. 2. In this case, it is contained in the grant of power itself—that the Senate shall try all impeachments. Art. I, § 3, cl. 6. Thus here, as in *Powell*, judicial review is required to enforce a textual limitation on congressional power, and to uphold the clear command of the Constitution.

3. Respondents and *amicus curiae* further argue that "the historical record refutes petitioner's claim that use of a committee to gather evidence is a novel approach at

odds with the early understanding," and that the "House of Lords had a long history of using committees to hear witnesses and compile evidence in impeachment trials." Opp. at 15-16. This argument misstates both petitioner's argument and the facts. The House of Lords used impeachment committees on a few occasions in the early 1600's—a century and a half before the Constitution was drafted. *See* Williams, *The Historical and Constitutional Bases for the Senate's Power To Use Masters or Committees To Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 531-32 (1975). However, there appears to be "no direct reference to the use of committees during later impeachment trials" in the House of Lords, *id.*, much less a "long history" of such use there.

Although Jefferson's Manual refers to this early English practice, *see* Opp. at 16 & n.19, the committee trial procedure was not used by the Senate during the period Jefferson himself served as President of that body, nor during the period contemporaneous with the lives of the Framers.

Any contention that the Constitution implicitly authorizes dispensing with trial by the Senate ultimately is contradicted by the history of the impeachment clause itself. In particular, the drafters of the Constitution specifically rejected a proposal made by John Dickinson whereby judges could be removed by "address," through majority vote by either House or Senate but without a trial before either. *See* M. Farrand, *Records of the Federal Convention*, 428 (1966). Instead, the drafters chose the deliberately cumbersome two-step impeachment process, with trial by the Senate. For nearly two centuries of the nation's history, moreover, the Senate was faithful to this procedural requirement.[1]

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[1] Respondents and *amicus curiae* suggest that review may not be warranted here because there is no basis for a waiver of sovereign immunity, and also because the Claims Court, not the district court, has subject matter jurisdiction over the dispute. Opp. at 13 n.15. The Administrative Procedure Act, however, expressly waives sover-

CONCLUSION

For all the foregoing reasons, and those stated in the petition, this Court should issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the questions presented in the petition.

Respectfully submitted,

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eign immunity in actions against federal agencies or officers "seeking relief other than money damages." 5 U.S.C. § 702 (1988). The primary focus of petitioner's claim in this action, moreover, is declaratory relief. For this reason, jurisdiction in the Claims Court under the Tucker Act also is not warranted. *See Bowen v. Massachusetts*, 487 U.S. 879, 893, 901, 904 (1988); *see also Nixon v. United States*, Pet. App. A, at 24a-27a (Edwards, J., dissenting in part and concurring in the judgment).

Respondents and *amicus curiae* also erroneously state that petitioner's counsel conceded below that petitioner "could be tried in the presence of only a small number of Senators, as long as it was done on the Senate floor." Opp. at 8. No such concession was made, as the order denying Nixon's petition for rehearing makes clear. *See Nixon v. United States*, Pet. App. F, at 84a-85a (Edwards, J.). Moreover, as the petition to this Court emphasizes, under the Constitution a quorum of at least 51 Senators is required for the Senate to conduct its business, Pet. at 24, and whether some individual Senators might fail to attend trial proceedings on the Senate floor cannot legitimate the adoption of a committee procedure that conflicts with the clear requirements of the Constitution. *Id.*